

# Domestic Court Records before the ICTR

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### 1. Introduction

This article analyses the case law about obtaining, disclosing, and using Rwandan domestic judicial records in proceedings before the United Nations International Criminal Tribunal for Rwanda (ICTR). It focuses on the ICTR decisions that address the issue of witness statements made before Gacaca courts in Rwanda,<sup>1</sup> as well as the Prosecution's disclosure practices for these particularly important records in the past few years. This article arrives at the conclusion that the ICTR case law and Prosecution practice have advanced, helping to develop international criminal law, and the latter has come to be what is popularly referred to as a 'best practice.'

### 2. ICTR Case Law on Rwandan Records

#### 2.1. The *Cyangugu* Approach ('Possession is nine tenths of the law')

Early ICTR case law on Rwandan judicial records<sup>2</sup> often focused on the lack of an obligation on the Prosecution to make any affirmative efforts to obtain and disclose such records, including Gacaca

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<sup>1</sup> 'These [Gacaca] tribunals are derived from traditional Rwandan community courts, in which the elders would sit on the grass—gacaca is the Kinyarwanda word for grass—and resolve community conflicts.' Erin Daly, 'Between Punitive and Reconstructive Justice; the Gacaca Courts in Rwanda', 34 NYU J. Int'l L. & Pol., 355, at 356 (2002); available at: <http://ssrn.com/abstract=1562012>. Rwanda adopted its Gacaca law in 2001 and amended it. See Organic Law No. 40/2000 of 26/01/2000; Organic Law No. 16/2004 of 19/06/2004 (amending); Organic Law No. 10/2007 of 01/03/2007 (amending); Organic Law No. 13/2008 of 19/05/2008 (amending); see Gerard Gahima, *TRANSITIONAL JUSTICE IN RWANDA: ACCOUNTABILITY FOR ATROCITY*, Routledge, Oxon, 2013, at 161. The Gacaca courts closed officially in 2012. *Id.* See generally, Paul Christoph Bornkamm, *RWANDA'S GACACA COURTS: BETWEEN RETRIBUTION AND REPARATION*, Oxford Univ. Press, 2012; Phil Clark, *How Rwanda Judges Its Genocide*, African Research Institute, 2012; Nicholas A. Jones, *THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA*, Routledge, Oxon, 2010; Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge Univ, 2010; William Schabas, *Genocide Trials and Gacaca Courts*, 3 J. of Int'l Crim. Justice 879, 2005.

<sup>2</sup> See *Prosecutor v. Bagambiki & Imanishimwe; Prosecutor v. Ntagerura*, ICTR-99-46-T, Decision on Bagambiki's Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda, 1 December 2000 (denying Defence motion for disclosure as Rwandan judicial records were not in the possession of the Prosecution and holding 'it would be very strange indeed, if not compatible, to order a party to obtain evidence for the opposing party beyond the requirements of Rule 68...'); *Kajelijeli v. Prosecutor*, ICTR-98-44-A-A, Judgement, 23 May 2005, para 263 (Appeals Chamber) (holding that Rule 68 does not extend to impose on the Prosecution an affirmative duty to

records, which came into existence between 2001 and 2012. One cannot disclose what does not possess. In U.S. layman's terms, the Prosecution submitting that 'we ain't got it' amounted to the end of the legal analysis.

## 2.2. The *Bagilishema* Approach

But the jurisprudence advanced to where 'we ain't got it', was not good enough. The first decision on point is that of 8 June 2000 in *Bagilishema*<sup>3</sup> and set a precedent. Trial Chamber I, Judge Møse presiding, denied Defence Counsel Roux's motion filed under Rule 68 seeking purportedly exculpatory written 'confessions' made in Rwanda of three Prosecution detainee witnesses who had already testified and mentioned in their testimony their having previously made such confessions. The *Bagilishema* Trial Chamber held, 'The Prosecutor cannot disclose that which she does not have.'<sup>4</sup> The Trial Chamber, however, on its own initiative, and notwithstanding the fact that the Prosecutor did not possess the confessions sought, ordered under Rule 98 the Prosecutor to produce these confessions. Rule 98 allows for a Trial Chamber, *proprio motu*, order any party to produce additional evidence or summons a witness. This Decision gave as rationale simply that these confessions 'could be material in evaluating the credibility of the said Prosecution witnesses.'<sup>5</sup> In effect, the Prosecution was then obliged to request the confessions from the Rwandan authorities for its own witnesses, and not just disclose them, but file them with the Trial Chamber itself.

## 2.3. Split in Authority

Five months later, however, a split between Trial Chambers arose. On 1 December 2000, Trial Chamber III, Judge Williams presiding (with a common-law background), rendered a Decision in the '*Cyangugu*' case on a Rule 73 motion filed by the Bagambiki defence seeking an Order compelling the Prosecution to disclose its 11 prospective Rwandan detainee-witnesses's written admissions of guilt made in Rwanda, as their ICTR statements mentioned their having previously plead guilty in Rwanda. Notably, the Bagambiki Defence's motion relied on one sole authority, the

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obtain statements of its detainee witnesses from the Rwandan authorities); *but see Prosecutor v. Bagambiki & Imanishimwe; Prosecutor v. Ntagerura*, ICTR-99-46-T, Decision on Bagambiki's and Ntagerura's Motion for Disclosure of Confessions of Detained Witnesses, 8 March 2002, para. 19(a) (requesting the Rwandan authorities to provide to the ICTR Registry the Rwandan witness statements in question).

<sup>3</sup> See *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Decision of the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses, Y, Z, and AA, 8 June 2000 (ordering the Prosecution to request judicial records from Rwanda under Rule 98).

<sup>4</sup> *Ibid.*, para. 7.

<sup>5</sup> *Ibid.*, para. 10.

*Bagilishema* decision rendered a few months earlier. The Prosecution submitted that it did not possess the records in question, but if ordered it could make a request to Rwanda. The Trial Chamber in *Cyangugu* simply denied the Defence motion for disclosure based solely on the Prosecutor's lack of possession of the records sought. Moreover, it did *not* make a Rule 98 order for the Prosecutor to produce the written records sought. It held that 'Rule 98 does not provide for a Trial Chamber to order a party to go and obtain evidence on behalf of another party.'<sup>6</sup> Relying on rules of 'adversarial criminal proceedings', the Trial Chamber in *Cyangugu* held that 'it would be very strange indeed, if not incompatible, to order a party to obtain evidence *for the opposing party* beyond the requirements of Rule 68....'<sup>7</sup> I remember Judge Williams' strong views on this subject as an Associate Legal Officer working in Trial Chamber III at this time. The Defence failed to prove the 'evidential necessity' of the records sought, according to Trial Chamber III.<sup>8</sup> Perhaps significantly in *Cyangugu*, the Rwandan records were sought before trial, before the Trial Chamber started assessing the credibility of live witnesses.

So, a split in authority arose. One Trial Chamber found that Rule 98 allows it to order the Prosecution to produce Rwandan records and did so because they go to witness credibility, and another Trial Chamber held that Rule 98 does not provide for such a mechanism and focused strictly on whether the Prosecutor had the records in her possession or not.

After the Decision of 1 December 2000 in *Cyangugu*, other decisions (denying requests for Rwandan records focusing strictly on the fact that the Prosecutor did not possess the records sought), followed suit in: the 'Butare' case in 2001;<sup>9</sup> *Nzirorera* in 2003;<sup>10</sup> *Simba* in 2004;<sup>11</sup> and before the Appeals Chamber in *Kajelijeli* in 2005<sup>12</sup> and *Rutaganda* in 2006.<sup>13</sup>

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<sup>6</sup> See *Prosecutor v. Bagambiki & Imanishimwe; Prosecutor v. Ntagerura*, ICTR-99-46-T, Decision on Bagambiki's Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda, 1 December 2000, para. 13.

<sup>7</sup> *Ibid.*, para. 14.

<sup>8</sup> *Ibid.*

<sup>9</sup> See *Prosecutor v. Nyiramasuhuko et al*, ICTR-97-21-T, Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in Their Respect, 18 September 2001, para. 16.

<sup>10</sup> See *Prosecutor v. Nzirorera et al*, ICTR-98-44-T, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003.

<sup>11</sup> See *Prosecutor v. Simba*, ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004 (denying a Defence request under Rule 68 to order the Prosecution to obtain judicial records for witnesses from Rwandan authorities).

<sup>12</sup> See *Kajelijeli v. Prosecutor*, ICTR-98-44-A-A, Judgement, 23 May 2005, para. 263 (Appeals Chamber) (holding that Rule 68 does not extend to impose on the Prosecution an affirmative duty to obtain statements of its detainee witnesses from the Rwandan authorities).

<sup>13</sup> See *Rutaganda v. Prosecutor*, ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, 8 December 2006, paras 45-46 (Appeals Chamber) (holding 'the Prosecution

In contrast, following the *Bagilishema* precedent (and Judge Møse's 'school of thought'), numerous Defence requests for Rwandan records were converted into Rule 98 orders in: the '*Media*' case (oral decision of 4 September 2001);<sup>14</sup> *Kajelijeli* in 2001;<sup>15</sup> *Ndayambaje* in 2001;<sup>16</sup> *Bagosora* in 2003;<sup>17</sup> *Casimir Bizimungu et al* in 2004;<sup>18</sup> *Simba* in 2004;<sup>19</sup> *Simba* again in 2004 (holding that 'Rule 98 may be invoked to expedite the proceedings given the importance of these [Rwandan] records to the preparation of the parties');<sup>20</sup> *Karemera et al* in 2005;<sup>21</sup> and *Nchamihigo* in 2005;<sup>22</sup> and *Nzabonimana* in 2009.<sup>23</sup> Presiding Judge Byron in *Nchamihigo* added that the Prosecution is best placed to know what domestic judicial records exist for its witnesses, and that such an order could be issued under Rule 98 or 54.<sup>24</sup> The *Gatete* Trial Chamber described this growing body of

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has no obligation to obtain judicial material related to its witnesses from Rwanda', but noting that some Chambers have 'requested the Prosecution to assist the defence and use its good offices in order to obtain such material'.

<sup>14</sup> See *Prosecutor v. Nahimana et al*, ICTR-99-52-T, Oral Ruling of 4 September 2001 (directing the Prosecutor to make every effort to obtain from the Government of Rwanda the records of witness' plea agreements, the date of conviction and sentences of any confessions filed with the courts as well as the records of all other witnesses the Prosecution intends to call or has called who are in custody in Rwanda).

<sup>15</sup> See *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001, paras 20-22 (ordering, under Rule 66(A)(ii) and without reference to Rule 98, the Prosecutor to make all efforts to obtain prior statements made before Rwandan authorities of detained witnesses).

<sup>16</sup> See *Prosecutor v. Ndayambaje*, ICTR-96-8-T & *Prosecutor v. Nsabimana*, ICTR-96-8-T, Decision on the Defence Motions Seeking Documents Relating to Detained Witnesses or 'leave of the Chamber to Contact Protected Detained Witnesses, 15 November 2001, para. 25 (ordering, under Rule 66(A)(ii) and without reference to Rule 98, the Prosecution to make all efforts to obtain from the Rwandan authorities the statements of detained witnesses and disclose them).

<sup>17</sup> See *Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva*, ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witness, 16 December 2003 (ordering the Prosecution to request judicial records from Rwanda under Rule 98).

<sup>18</sup> See *Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004 (Judge Khan), paras 9-11 (ordering, without reference to Rule 98, the Prosecution to request Prosecution witness GAP's statement from the Rwandan authorities).

<sup>19</sup> See *Prosecutor v. Simba*, ICTR-01-76-T, Decision on 'Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins Prisonniers', 14 July 2004, paras 6-7 (instructing the Prosecution to make all efforts to obtain the Rwandan criminal records of its detained witnesses by 2 August 2004, in lieu of issuing an order to the Rwandan Government under Article 28 of the Statute).

<sup>20</sup> See *Prosecutor v. Simba*, ICTR-01-76-T, Decision on Matters related to Witness KDD's Judicial Dossier, 1 November 2004 (ordering the Prosecution, apparently under Rule 98, to 'make additional efforts to obtain the judicial dossier' of a witness from Rwandan authorities).

<sup>21</sup> See *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Motions to Compel Inspection and Disclosure and to Direct Witness to Bring Judicial and Immigration Records, 14 September 2005, paras 7-11.

<sup>22</sup> *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Order for Judicial Records, Rules 98 and 54 of the Rules of Procedure and Evidence, 12 October 2006 (ordering the Prosecution to request judicial records from Rwanda under Rule 98).

<sup>23</sup> See *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material relating to Prosecution Witnesses (Rules 66, 68 and 73 of the Rules of Procedure and Evidence), 29 October 2009 (directing 'the Prosecution to use its best efforts to obtain and disclose ... all Gacaca and prior judicial records pertaining to all witnesses on the Prosecution's Witness List'); see also *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on the Prosecutor's Motion for Reconsideration, and/or Certification of the Decision Rendered on 29 October [2009] Relating to Prosecution Witness, Rule 73 (B) of the Rules of Procedure and Evidence ('RPE'), 27 November 2009, para. 14 (denying the Prosecution request for reconsideration of the Decision of 29 October 2009 because that Decision did not in fact create any 'new disclosure regime').

<sup>24</sup> *Prosecutor v. Nchamihigo*, ICTR-2001-63-T, Order for Judicial Records, Rules 98 and 54 of the Rules of Procedure and Evidence, 12 October 2006.

law as ‘a practice [that] has developed at the Tribunal of ordering the Prosecution to obtain [Rwandan] judicial records pursuant to a Trial Chamber’s discretion under Rule 98’.<sup>25</sup>

#### **2.4. A Legal Test for Deciding Whether to Order the Prosecutor to Obtain Records**

Interestingly, two earlier Decisions in *Simba*, those of 4 October 2004<sup>26</sup> and 28 October 2004, represented opportunities for Judge Møse’s Trial Chamber to follow the *Bagilishema* precedent, but the *Simba* Trial Chamber did not do so on these two occasions. Why? The Trial Chamber in the 4 October 2004 *Simba* decision held that ‘the Statute and Rules do not extend to [impose a duty on the Prosecutor to pursue] every possible avenue of investigation into a witness’s credibility on behalf of the Defence.’<sup>27</sup> I parenthetically insert here that is in contrast to the Rome Statute’s affirmative obligation on the ICC Prosecutor with regard to exculpatory evidence. Moreover, the *Simba* Trial Chamber spelled out some of the factors relevant to decide if a Rule 98 order is appropriate for domestic records. First, the Rwandan witnesses for whom the Defence sought Rwandan records on this occasion were not detainee witnesses or alleged accomplices (as they were in *Bagilishema* and the 14 July 2004 *Simba* Decision). Second, the records sought did ‘not appear to relate to ... credibility’. Third, the *Simba* Trial Chamber held that ‘the Defence must first make its own independent efforts to secure evidence it wishes to use at trial’. If such Defence efforts fail, the *Simba* Trial Chamber noted the appropriate remedy is not another motion seeking an order under Rule 98, but rather a motion under Article 28 of the Statute seeking an order to compel a State—Rwanda in this context—directly; effectively cutting out the Prosecutor from the process.<sup>28</sup>

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<sup>25</sup> See *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, para. 13; see also *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Callixte Nzabonimana’s Motion for an Order Concerning Disclosure of Gacaca and Judicial Material relating to Prosecution Witnesses (Rules 66, 68 and 73 of the Rules of Procedure and Evidence), 29 October 2009, para. 30 (recalling ‘that a practice has developed at the ICTR of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witnesses, in the interests of justice.’); *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006, para. 7; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Defence Motion for Exclusion of Witness GK’s Testimony or for Request for Cooperation from Government of Rwanda, 27 November 2006, para. 7 (denying Defence request); *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Motions to Compel Inspection and Disclosure and to Direct Witness to Bring Judicial and Immigration Records, 14 September 2005, paras 7-8 (denying Defence request).

<sup>26</sup> *Prosecutor v. Simba*, ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004 (denying a Defence request under Rule 68 to order the Prosecution to obtain judicial records for witnesses from Rwandan authorities).

<sup>27</sup> *Id.*, para. 8.

<sup>28</sup> See generally *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on Defence Motion for Disclosure of Complete Statements of Witness DCH and for Cooperation of Rwandan Government, 17 April 2002, para. 15 (denying a Defence request upon the disclosure by the Prosecution of Rwandan judicial records and denying a request to order Rwanda); *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion requesting Disclosure by Swiss Authorities of

The *Simba* Trial Chamber of 28 October 2004 also denied a Defence request for the Rwandan records related to Prosecution witness KDD's death sentence because the Defence failed to demonstrate its efforts to obtain the records sought.<sup>29</sup>

In *Casimir Bizimungu et al*, Judge Khan, as a Single Judge, uniquely ruled on this issue within the framework of Rule 68, not Rule 98, and characterized the 'inherent' obligation of the Prosecution as follows:

[Rule 68...] does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule [68] not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided that it is show that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution's inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan authorities, where, as a practical reality, the Prosecution enjoys greater leverage than [does] the Defence.<sup>30</sup>

This Decision effectively provided another alternative legal basis for imposing on the Prosecution a duty to seek Rwandan records of its witness, and added a specificity requirement on the Defence. It also provided for an essentially *inter partes* disclosure process.

So, cobbling together the decisive factors from the then-case law, it appeared that a Rule 98 (or Rule 54 or 68) order to compel the Prosecution to affirmatively seek out Rwandan domestic records was appropriate if: (1) such records go to the credibility of relevant witnesses and it would expedite proceedings and preparations; (2) such witnesses were detainees or accomplices; (3) the Defence

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the Entire Judicial Dossier Relating to the Accused, 11 September 2007 (noting the Prosecution joined the Defence request for disclosure of the accused's dossier from Switzerland).

<sup>29</sup> *Prosecutor v. Simba*, ICTR-01-76-T, Decision on Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, 28 October 2004 (denying the Defence request).

<sup>30</sup> *See Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004 (Judge Khan), paras 9-11 (ordering, without reference to Rule 98, the Prosecution to request Prosecution witness GAP's statement from the Rwandan authorities).

had made due diligence efforts<sup>31</sup> for the evidence it sees to introduce; and (4) the Defence identified the records sought with specificity.

## **2.5. Overlap with Rule 66(B) Duty to Make Available Domestic Immigration Records**

I should perhaps digress briefly here and note that there exists an overlap between the above case law and Rule 66(B), in that the latter requires the Prosecution to make available for inspection requested evidence that is material to the preparation of the Defence. In a related Decision of 25 September 2006, the ICTR Appeals Chamber ordered the Prosecution to make available for inspection the domestic immigration and asylum-request records related to Defence witnesses that the Prosecution had collected from third States in anticipation of cross-examining those witnesses because, it held, such records, touching witness credibility, is material to the Defence preparation of selecting (or de-selecting) witnesses to testify.<sup>32</sup> So, in general, Chambers are going to treat domestic records relevant to credibility as ‘material’ to preparations, subject to disclosure, and warranting due diligence efforts to produce them.<sup>33</sup>

## **2.6. Possession Is Still Relevant After Prosecution Compliance with a Rule 98 Order**

Notably, once the Prosecution has duly requested the records sought from Rwanda, pursuant to a Trial Chamber’s Rule 98 order to produce Rwandan records, it is presumed to have acted in good faith and complied.<sup>34</sup> This is so even absent delivery of such records by Rwandan authorities.

## **3. The Start of a Prosecution Best Practice**

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<sup>31</sup> See *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, footnotes 21-22; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006, paras 13-14 (denying a Defence request for an order under Rule 98); *Prosecutor v. Karera*, ICTR-01-74-T, Decision on Defence Motion for Additional Disclosure (Rule 98), 1 September 2006, para 5 (denying a request to order the Prosecution to request judicial records from Rwanda under Rule 98).

<sup>32</sup> *Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence, Appeals Chamber, 25 September 2006.

<sup>33</sup> See also *Prosecutor v. Karemera, Ngirumpatse & Nzirorera*, ICTR-98-44-AR73.11, Decision on the Prosecution’s Interlocutory Appeal concerning Disclosure Obligations, 23 January 2008 (holding that Rule 66(B) allows for the Defence to inspect witness statements in the possession of the Prosecution that affect the credibility of Defence witnesses).

<sup>34</sup> See *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Nzabonimana’s 2<sup>nd</sup> Motion for Disclosure of Evidence, for Renewed Authorization to Interview Certain Prosecution Witnesses and for Postponement of the Testimony of Witnesses CNA and CNAC, 17 December 2009, paras 18-20 (denying the Defence motion for

After the line of decisions stemming from the *Bagilishema* precedent using Rule 98 to order the Prosecution to produce Rwandan court and Gacaca records, and building on it, the Prosecution saw the writing on the wall. A Prosecution practice then developed to conform to this new reality. Most Prosecution trial teams, as a part of their pre-trial preparations, affirmatively sought out from Rwandan authorities the judicial and Gacaca records for its listed Rwandan witnesses. I know this was the case in the *Seromba* case on which I worked and helped prepare, which in turn had a knock-on effect in the related trials of *Ndahimana* and *Kanyarukiga*.<sup>35</sup> In the *Seromba* case, this practice paid big dividends at trial. For example, the Prosecution sought and received 11 prior written witness statements from the Rwandan authorities from our presumed star Prosecution witness, the bulldozer driver who knocked down Nyange church in the attack killing 2,000 parishioners in April 1994. The Tribunal painstakingly translated these 11 statements from Kinyarwanda into English and French, and the Prosecution disclosed first them in redacted format, and then in non-redacted format. We were expecting that these 11 statements attributing to Father Seromba the instructions to destroy the church to constitute prior *consistent* statements, should he need to be rehabilitated. As it turned out, the star witness flipped, the Prosecution dropped him, and the Defence called him to testify. He testified in full contradiction to his written statements, and these 11 statements proved to be prior *inconsistent* statements that the Trial Chamber admitted into evidence to corroborate the other eyewitnesses to Seromba's instructions to the bulldozer driver to destroy the church.

Other examples of this affirmative trend and Prosecution practice include the prosecutions in: *Gatete* in 2009;<sup>36</sup> *Ngirabatware* in 2010;<sup>37</sup> and *Nizeyimana* in 2010.<sup>38</sup>

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disclosure as the Gacaca record in question—even after the Prosecution's previous compliance with the 29 October 2009 order—was still not in the possession of the Prosecution).

<sup>35</sup> See *Prosecutor v. Kanyarukiga*, ICTR-2002-78-I, Decision on the Extremely Urgent Defence Motion for Postponement of the Start of the Trial, 29 May 2009 (noting the Prosecution disclosed 'all Gacaca court materials in its possession.').

<sup>36</sup> See *Prosecutor v. Gatete*, ICTR-2000-61-PT, Decision on Defence Motions for Disclosure pursuant to Rule 66 (A)(ii) and Commencement of Trial, Rule 66 of the Rules of Procedure and Evidence, 13 October 2009, para. 31 (noting the Prosecution used 'its best efforts to acquire' Gacaca records from Rwanda and promptly disclosed them); *Prosecutor v. Gatete*, ICTR-2000-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, at footnotes 5-6, para. 25 (recalling that the Prosecution promptly disclosed Rwandan judicial records in its possession).

<sup>37</sup> See *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Prosecution Motion for Leave to Vary its Witness List, 28 January 2010 (urging the Prosecution, following its undertaking, to disclose any Gacaca records regarding newly added witnesses as soon as possible, and encouraging 'the Defence to use its own resources to obtain the documents').

<sup>38</sup> See *Prosecutor v. Nizeyimana*, ICTR-00-55-C-T, Decision on Defence Motion for Disclosure of Immigration Documents, Gacaca Documents and Other Statements under Rule 66(B), 10 May 2011 (dismissing as moot a Defence request because the Prosecution had voluntarily made, under Rule 66(B), Gacaca and other Rwandan records available for inspection).

#### **4. Despite Best Practices, Unexpected Challenges May Still Arise**

Now admittedly even the best practices can be confronted by investigative challenges on the ground. In *Nizeyimana* in 2010, the Prosecution, consistent with this best practice, undertook at pre-trial to request from the Rwandan authorities all records in Rwanda of its Rwandan witnesses, but the Prosecution acknowledged that acquiring all such records would be difficult at that particular point in time.<sup>39</sup> This was due to the fact that the Rwandan government was moving the Gacaca records just then from each sector to Kigali in order to centralize them.<sup>40</sup>

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<sup>39</sup> See *Prosecutor v. Nizeyimana*, ICTR-00-55-C-T, Status Conference Transcript, 5 March 2010.

<sup>40</sup> See Interview with Drew White, Prosecution Senior Trial Attorney in *Nizeyimana*, 30 August 2014 (on file with author).



Photograph 1: Gacaca records in Kigali, Rwanda (2010)



Photograph 2: Gacaca records in Kigali, Rwanda (2010)

In practice, the Gacaca recordkeeping at that particular time in Rwanda was, as appears in these two photographs, described as ‘incomplete, unconsolidated, an un-indexed mess’ and ‘an impenetrable barrier to organized investigation.’<sup>41</sup> The Prosecution sent these two photographs to the *Nizeyimana* defence,<sup>42</sup> and, in time, the Rwandan authorities organized the centralized Gacaca records.<sup>43</sup> Later, regarding the Defence phase of the *Nizeyimana* case, the Senior Trial Attorney

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<sup>41</sup> Interview with Drew White, 26 September 2014 (on file with author); *see also* Prosecutor v. Setako, ICTR-04-81-T, Transcript of 24 June 2009 (testimony of expert witness Bert Ingelaere on Gacaca proceedings).

<sup>42</sup> Interview with Drew White, 26 September 2014.

<sup>43</sup> *See* Interview with Didace Nyrinkwaya, 9 October 2014 (on file with author).

also noted that as to Gacaca records for Defence witnesses acquired by the Prosecution, they were difficult to obtain and often arrived late enough that their translation disrupted the trial schedule.<sup>44</sup>

## 5. Conclusion

In conclusion, ICTR case law developed positively following the *Bagilishema* Decision of June 2000, become more nuanced, and moved away from a solely possession-focused legal analysis for deciding requests for relevant domestic records. The Prosecution's practice in recent years of seeking out such Rwandan records on its own initiative at a pre-trial stage represents an improvement and an advance in international criminal law. Notably, seeking out such Rwandan records is best done at the earliest stages of pre-trial because they take time to actually get in hand (as happened when Rwanda centralized its Gacaca records in 2010) and translate from Kinyarwanda.

The result from this case law and Prosecution best practice is the admission into evidence of more relevant evidence, including prior consistent and inconsistent statements. The availability of such evidence improved the ICTR's ability to better assess the credibility of many witnesses. Where trials are years after the events, with some Prosecution-collected witness statements being less than complete, and with the many cross-cultural challenges for Trial Chambers to assess the credibility of Rwandan witnesses<sup>45</sup> speaking through interpreters, these Rwandan records—often created closer in time to the events—are indeed valuable pieces of evidence. Though beyond the scope of this article, one must also consider that the accuracy and reliability of Gacaca-collected evidence is also linked to the challenges within the Gacaca process as a whole and dealing with crimes of such a massive scale, essentially without lawyers. In sum, though, with more domestic court records disclosed and admitted into evidence, including Gacaca records, the parties and the Chambers were better able to test witnesses and render justice.

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<sup>44</sup> See Interview with Drew White, 30 August 2014.

<sup>45</sup> See e.g. N. Combs, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).